ILE COPY

Office-Supreme Court, U.S.
FILED
DEC 12 1960.
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960.

No. 578

UNITED STATES OF AMERICA

v.

SAM SCHWARTZ,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for Petitioner.

International, 711 So. 50th St., Phila. 43, Pa.

INDEX.

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes and Regulations Involved	2
Statement of the Case	2
Reasons for Granting the Writ	3
Conclusion	12
Appendix A. Opinion Below	13
Appendix B. Judgment Below	22
Appendix C. Judgment Denying Rehearing	23
Appendix D. Statutes Involved	24

TABLE OF CASES CITED.

	Page
Draper v. United States, 358 U. S. 307 (1959)	8
Elkins v. United States, 364 U. S. 206 (1960)	7
Mallory v. United States, 354 U. S. 449 (1957)	8
McNabb v. United States, 318 U. S. 332 (1943)	8
Nardone v. United States, 302 U. S. 379 (1937)	8
Nardone v. United States, 308 U. S. 338 (1939)	8
Oliver v. United States, 239 F. 2d 818 (1957)	8, 9
Service v. Dulles, 354 U. S. 363 (1957)	9, 10
United States ex rel. Accardi v. Shaughnessy, 347 U. S. 260 (1954)	9, 10
United States v. Eaton, 144 U. S. 677 (1892)	8
Vitarelli v. Seaton, 359 U. S. 535 (1959)	9, 10
Weeks v. United States, 232 U. S. 383 (1914)	8

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
39 C. F. R. Section 5.2 (Supp. 1960)	6
39 C. F. R. Section 41.4(b) (1949 ed.)	4
Postal Regulations:	
Part 311.6	4, 5, 10
Sec. 331.12	9
Part 831.44	5
S. Rep. No. 2510, 83d Cong. 2d Sess. (1954), reprinted at 101 Cong. Rec. 2564 (1955)	4
18 U. S. C. Sec. 1341	2
28 U. S. C. Section 1254(1)	1
39 U. S. C.:	
Section 259	6
Section 732	6
Section 865(b) (Supp. 1959)	6
Section 963(32) (Supp. 1959)	6

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No.

UNITED STATES OF AMERICA

v.

SAM SCHWARTZ,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Sam Schwartz, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on October 6, 1960.

OPINIONS BELOW.

The opinion of the District Court is reported at 176 F. Supp. 613. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 13-21) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals (Appendix B, *infra*, p. 22) was entered on October 6, 1960. A timely petition for rehearing was denied on November 16, 1960 (Appendix C, *infra*, p. 23). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTION PRESENTED.

Whether a defendant in a criminal proceeding is entitled to have suppressed and excluded evidence obtained by means of a mail "watch" or "cover" of his first class mail conducted by postal inspectors, the results of which were disclosed by them to the Department of Justice.

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved are set out in (Appendix D, *infra*, pp. 24-26).

STATEMENT OF THE CASE.

Appellant was convicted of mail fraud, under 18 U. S. C. Sec. 1341, on evidence obtained by a Postal Inspector of the United States Post Office by means of a "mail watch". In the court below, prior to trial, appellant moved to have such evidence suppressed (5a).* The motion was denied (47a). This motion was renewed at the trial and again denied (54a, 64a).

Between November 1958 and March 1959, Thomas J. Hillegass, a Postal Inspector in the United States Post Office Department, intermittently, for periods of 10 to 15 days, maintained a "mail watch" on first-class mail addressed to appellant. A clerk was assigned to scrutinize all such mail as it passed through the Post Office and to note the names and addresses of the senders. A list of some 250 names and addresses was obtained by this method. The Postal Inspector subsequently communicated with most of these persons (41a) and obtained information about the appellant. This information was turned over to the United States Attorney and formed the basis for the indictment

* References suffixed "a" are to the Appendix filed by petitioner in the Court of Appeals, nine copies of which have been filed in this Court.

and prosecution of appellant. The Assistant United States Attorney conceded at the trial

> "If your Honor please, we could not present a case except for the evidence produced from the mail watch. We got the names of the victims as a result of that mail watch, your Honor." (54a)

Appellant was convicted and sentences of imprisonment of one year and a day were imposed, to be served concurrently, on the various counts of the indictment.

The District Court determined that communicating the results of a "mail watch" to the Justice Department was prohibited by the Regulations of the Postal Department, but denied petitioner's motion to suppress the evidence thus obtained on the ground that the remedy of suppression was too drastic (47a). The Court of Appeals affirmed the conviction, but disagreed with the District Court and held that the Regulations did not prohibit disclosure by postal inspectors of the results of a "mail watch"; therefore, it did not reach the question whether the evidence should be suppressed (Appendix A, *infra*, p. 21).

REASONS FOR GRANTING THE WRIT.

The question presented by this case is important to the administration of the federal criminal justice and in that field concerns the practical consequences of the regulations of a governmental department.

This case turns upon the legality of using in a criminal prosecution evidence obtained by a "mail watch" or "mail cover". The decision of the court below agreed with petitioner's contention that the relevant Postal Regulations forbid the disclosure of information derived from a "mail watch" to any other branch of the Government, including representatives of the Attorney General's office. It further recognized, and the Government has conceded, that the evidence used against petitioner was in fact transmitted to the United States Attorney in seeming violation of these

Regulations. The court below nevertheless affirmed petitioner's conviction. This apparent incongruity is based upon that court's determination that the officer in the postal establishment who actually transmitted the tainted evidence, a postal inspector, was immune from the prohibition of the Postal Regulations. This conclusion, it is respectfully submitted, is unwarranted and untenable.

The crux of the holding of the court below was that part 311.6 of the Postal Manual is not addressed to postal inspectors. To be sure, the present regulation does not affirmatively state who is governed by its provisions. The directive not to furnish information concerning mail is an unconditional imperative: "Do not give such information to others".

It should be noted that it was formerly provided that postmasters might furnish information obtained by a "mail watch" to "a representative of another executive department" upon official request. 39 C. F. R. Section 41.4(b) (1949 ed.). This language manifestly would have permitted the disclosure of information to representatives of the Justice Department. The reason for the change relates back to an incident in 1954 when it was discovered that a "mail watch" had been conducted with respect to mail addressed to the late Senator Joseph McCarthy. This had been done at the request of the staff of a Senate subcommittee to whom the information compiled had been given. A special Senate Committee strongly condemned the incident. S. Rep. No. 2510, 83d Cong. 2d Sess. (1954), reprinted at 101 Cong. Rec. 2564 (1955). This led to the adoption of the current Regulation which sharply limits the extent to which information can be divulged.

The court below held, nevertheless, that postal inspectors are not among those forbidden to make disclosure. This requires a severe distortion of language, as well as concept, since it is agreed that the scope of the current regulation is the same as its predecessor, which did specify those who are governed by the rule. Section 41.4 declared

that "Postmasters and others in the postal service . . ." were restricted. In effect, the court below has held that postal inspectors are not in the postal service, a patently untenable construction.

The Court of Appeals believed that this construction was supported in the language of the Regulations, past and present, since both permit disclosure of information concerning mail *to* postal inspectors. It seemed to the Court that since much information could be given properly *to* such individuals, the Regulation could not be read to make it improper to receive information *from* them.

There is no logic in the conclusion that a postal inspector is free from the restrictions of part 311.6 simply because he may be entitled to receive the kind of information governed by the Regulation. The Postal Regulations, particularly part 831.44, do contemplate that there will be "mail watches" and that the results of such practices will be given to postal inspectors. Part 311.6 permits anyone not a postal inspector to transmit such information to a postal inspector; and it permits postal inspectors to transmit such information to other postal inspectors. However, there is nothing to support the statement of the Court of Appeals that "certainly, if postal inspectors were intended to be designated as among those persons to whom the admonitions of this part were addressed they would not have been included in the class of eligible recipients." (Appendix A, *infra*, p. 7).

The ultimate point is this: If part 311.6 does restrict the right of postal inspectors to disclose the information, the use of the "mail watch" will not be confined to intra-departmental affairs. If part 311.6 does not govern the actions of postal inspectors, the officers whose duty it is to collect data by use of the "mail watch" technique will be totally unfettered on their power of disclosure. The obvious purpose of the Regulations, to protect the privacy of information derived from mail, will be frustrated by interpreting the Regulation not to cover precisely those officials who are most likely to be in possession of the data.